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ABSTRACT

After the Lindbergh kidnapping trial in 1935, the American Bar Association sought to eliminate electronic equipment from courtroom proceedings. Eventually, all but two states adopted regulations applying that ban to some extent, and a 1965 Supreme Court decision encouraged the banning of television cameras at trials as well. Currently, some states or courts allow television coverage with varying kinds of limitations. Some courts have used electronic equipment for their own purposes, including recording testimony, videotaping police line-ups, and using closed-circuit television to allow spectators to watch a trial from outside the courtroom, while other jurisdictions continue to ban all photography and television. Changes in equipment have made it possible to videotape, audiotape, televise, or photograph court proceedings with little disruption. Some regulatory bodies have concluded that recording the proceedings of appellate courts is acceptable, but since the effect of electronic equipment on people in trial situations is unknown, those courtrooms must be kept clear of potential distractions. (TJ)

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FREEDOM OF INFORMATION CENTER REPORT NO. 396

THE CAMERA COMES TO COURT

This report was written by Leola Floren, a feature writer for the Detroit News and an M.A. candidate at the University of Missouri School of Journalism.

In 1935, a troop of camera-wielding photographers and reporters crowded into the courtroom where Bruno Hauptmann was on trial for kidnapping the infant son of Charles and Anne Murrow Lindbergh. Their over zealous, noisy coverage of that trial prompted the American Bar Association's passage, two years later, of Canon 35 of its Code of Judicial Conduct: an ironclad prohibition against courtroom photography.

Though the Hauptmann trial was the spark that ignited the legal reaction,[1] journalists had been stockpiling for quite some time the ammunition that ultimately was to be used against them. Long before that fiasco, cameramen loaded down with cumbersome and obtrusive equipment had disrupted courtroom proceedings, and some had even sneaked pictures of convicted murderers dying in the electric chair.

Members of the legal profession felt they had endured too much for too long. Canon 35, as passed in 1937, recommended a total ban on film and electronic coverage of courtrooms. The ABA later amended the canon to specifically include a prohibition of television coverage in courtrooms and added the clause "distract the witness in giving his testimony" as an additional danger of permitting photographers in courtrooms. ABA members and others then worked to enact the canon into state laws or court regulations throughout the country; Texas and Colorado were the only states that did not adopt the canon in some form.[2]

Estes: The Supreme Court Speaks

The greatest blow to television in the country's courtrooms, however, was the U.S. Supreme Court's 1965 decision in the Billie Sol Estes case, when the court voided (New York **Times**, 6-8-65) Estes' swindling conviction on the grounds that television cameras were permitted in the courtroom.

Texas, virtually the only state that had permitted some judicial discretion in the use of cameras in courtrooms, was the location of Estes' trial. The New York **Times** (9-25-62) offered this description of a pretrial hearing:

> A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates. A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Tables and wires snaked over the floor.

Despite the distractions caused by their presence, Judge Dunagan rejected (New York **Times**, 9-25-62) a motion by the defense that television, motion picture and still cameras be removed, saying,

> I know there's a growing storm about television in courtrooms, but I can assure you this court won't be turned into a circus. Yesterday I listened to a televised sermon from the First Baptist Church in Dallas and certainly there wasn't any circus in that church. If TV is a proper instrument in the house of the Lord it's not out of place in the courtroom.

Nevertheless, three years later, in a 5-4 decision that suggested that the High Court on at least one occasion harbored less tolerance than the Lord, Estes' conviction was thrown out because his trial had been televised over his objection. That marked the last time the court has spoken — officially — on cameras in the courts.

In its ruling on Estes, the court laid down a rule that the televising of "notorious" criminal trials is prohibited by the due process clause of the 14th Amendment. Justice Warren's argument that the evil of televised trials lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised, is frequently cited today by those who oppose any coverage, no matter how discreet. Four justices said (New York **Times**, 6-8-65) that

Summary: The Freedom of Information Center's report series comes full circle with this look at the place electronic equipment is securing for itself in the nation's courtrooms. In May 1958, the Center published its first report, "A Judge Looks at the Press," a salute to the role of the press in the administration of justice, but expressing, too, how necessary judges believe dignity and decorum in the courtroom to be. As this present report indicates, today states are increasingly deciding that cameras in court can serve both a free press and a fair trial.

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"the time-honored principles of a fair trial" are violated when television is allowed in any criminal trial, and the majority ruled that television by its nature makes a fair trial impossible, citing these reasons:

1. there might be prejudicial effect on the jurors.
2. witnesses' testimony will be affected by their knowledge that they are on camera.
3. the judge's decisions might be affected by the presence of the television cameras.
4. the defendant is subject to "a form of mental if not physical — harassment, resembling a police line-up or the third degree."

Following the court's decision, new efforts were made to enact a ban on camera coverage of courtrooms in the few remaining states that allowed some leeway.

In his opinion on Estes, Justice John Harlan wrote: "The day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."[3] It has been 13 years since the court's last word on cameras in courtrooms, and some think the day tentatively foreseen by Justice Harlan — the day when a visually oriented society finds cameras acceptable anytime, under almost any circumstances — has arrived. Others do not.

Cameras ARE in the Courts

While television cameras for the purpose of news coverage still are rare in the courts, much electronic equipment now is used routinely. In effect, the camera has entered the court through the back door and in many instances has proved a viable tool for the court's purposes.

Videotape trials were conducted on an experimental basis in some states in the early 1970s. In the Sandusky, Ohio, Court of Common Pleas, all the testimony plus Judge James McCrystal's instructions to the jury were prerecorded (Columbia **Missourian**, 10-20-74) in a civil case. That trial in 1972 was the first ever in which all testimony was taped beforehand, though the practice of using electronic equipment to take depositions has become almost commonplace.

In Bennington, Vt., the 1973 trial of a man on a drunken driving charge was (Columbia **Missourian**, 10-20-74) the first prerecorded criminal trial. While canned trials may or may not ultimately be accepted, videotape already is playing a part in some phases of the judicial process. For example, videotape has been used to record police line-ups, confessions and statements by material witnesses against whom no charges have been filed.

A California jury watched two days of testimony on television monitors in a damage suit of a woman injured in an automobile accident. Both the attorneys and the judge agreed that the procedure cut the trial time in half and reduced the possibility of a mistrial because of prejudicial conduct by a lawyer. The attorneys reviewed the tapes in advance and decided which parts should be seen by the jurors. If they had disagreed, the judge would have decided which testimony was admissible. The judge admitted (New York **Times**, 9-23-73) that videotaped evidence was not a replacement for live witnesses. "I can't say it's as good, but in some circumstances it might be necessary and useful," he said.

A Michigan experiment in 1971 involved a systematic video-audio recording of criminal trials. The goal is a three-dimensional, video-audio-print official record of a criminal trial. Instead of the conventional typescript, electronic equipment could provide a record of hitherto unavailable vividness. And, the record's accuracy could easily be checked simply by viewing the tape. The hope is to speed appeals by reducing an average of 5.3 months of elapsed time between criminal jury trials and the filing of appeals. The delay is (New York **Times**, 11-26-71) largely due to the time involved in preparing a typewritten transcript of the trial record.

The camera already is a tool within the courts and rapidly is gaining acceptance in most areas of the judicial process. One question that remains is: Who is entitled to operate it? An employee of the court or an employee of the local television station — or both?

Good News for Cameras in the States

In spite of the generally discouraging climate for cameras in the courts earlier in this decade, a few cases did fuel optimism among those favoring electronic coverage. In 1970, National Educational Television carried excerpts of a trial filmed in Denver, Colo. At that time, Colorado was the one state that had rolled back its ban on cameras in its courtrooms.[4]

The program, "Trial: City and County of Denver vs. Lauren R. Watson," was serialized by the network and shown over several nights. Watson, a militant leader of the Black Panthers in Denver, was charged with resisting arrest. He was acquitted by a six-member jury after four days of trial.

Colorado guidelines required that all parties to the trial grant permission in advance in order for the trial to be filmed by the media, and that filming must stop upon the objection of any trial participant. After it was broadcast, the program received generally positive reviews from judges, lawyers and media people. The verdict, though hesitant and certainly not binding, was in: Cameras in the court were not necessarily disruptive.

Many states have run varying experiments with electronic coverage of courts since the relatively successful Colorado venture. Several basic plans for court coverage have been developed, and some states are allowing cameras on a trial basis. A joint survey of Radio-Television News Directors Association and The Reporters Committee showed that 12 states now permit television coverage of trial or appeals courts.[5] For trial courts, the states are either folllowing the Alabama plan, where parties such as the judge, the prosecutor, the defense counsel and the witnesses must give their consent, or the Florida plan, where television coverage cannot be vetoed unless it can be shown that the coverage will disrupt the trial.

According to the survey, the following states permit both trial and appeals court coverage: Alabama, Colorado, Florida, Georgia, Montana, Nevada, Washington and Wisconsin. (Montana and Wisconsin are allowing cameras on an experimental basis.) Trial court coverage is permitted in Kentucky, but in only one circuit court. States permitting appellate court coverage only are Texas, New Hampshire and Minnesota. Five states have authorized case-by-case exceptions to television bans: Idaho, Michigan, New York, Ohio and New Hampshire. Eight states are considering proposals to permit television in courts: Idaho, Illinois, Louisiana, Minnesota, Ohio, Oregon, Rhode Island and Vermont.[6]

The state of Washington changed its policy one year ago, in

September, to permit photographic coverage of courtrooms. No more than one still photographer and one television camera are allowed in the courtroom at any one time unless the judge decides otherwise. No additional lighting is allowed, and there is a dress code: "Broadcast representatives' dress should not set them apart unduly from other trial spectators."[7]

In 1975, the Alabama Supreme Court adopted a set of Canons of Judicial Ethics for all state judges including, for the first time, overall approval of courtroom photography, subject only to authorization by the presiding judge. The "Commentary" section of the new canons contains an argument that sounds quite similar to the one offered by Judge Dunagan in the Estes trial: "It is now universally recognized that the dignity of a church service is not affected in any degree by the photographing or broadcasting by television or radio . . . when sophisticated and advanced equipment and technology is used."[8] Thus, the court ruled that procedures deemed appropriate for churches are all right for courtrooms.

And last year, the Georgia Supreme Court changed the state's Code of Judicial Conduct to read in part:

> The Supreme Court may authorize the broadcasting, televising, recording, filming, and taking of photographs in . . . the courtroom of any Georgia court during any judicial hearing . . . provided the judge or judges presiding at the hearing permit the . . . activities.[9]

The Albuquerque courtroom of a district judge probably will be (Las Vegas **Daily Optic**, 7-21-78) the site of the first televised trial in New Mexico, if the state Supreme Court approves. The news media plan to videotape an entire criminal trial and then edit the tape to 30 minutes or an hour for broadcast on television.

The state receiving the most attention over its use of cameras in recent months is Florida, where a one-year trial period ended last summer. Post-Newsweek Stations, Florida, Inc. had filed a petition in 1975 with the state's Supreme Court for a change in the judicial code, and that action, after a two-year study, led to the experimental program. The most publicized trial under the experiment was that of Ronney Zamora, a teen-ager accused of murdering an elderly neighbor. After Zamora's conviction, trial Judge Paul Baker endorsed (St. Louis **Post-Dispatch**, 5-22-78) television coverage of court trials. "It gives the public a touch of reality," he said, "instead of the TV nonsense about the justice system that they are accustomed to seeing."

Another Florida judge was not so impressed. Palm Beach Circuit Judge Thomas E. Sholts presided over another murder trial. Like the Zamora trial, the Herman trial was videotaped in its entirety. In a report following the trial, Judge Sholts told (Miami **Herald**, 6-30-78) the state Supreme Court that "it is not only possible, but highly probable it (television in court) will have a direct bearing on a juror's vote." Sholts blamed the media for forcing sequestration of the Herman jury and suggested that the expense of rooms, meals and court personnel overtime should properly be borne by the media and not the taxpayers of Palm Beach County.

Despite Sholts' report, the high court, which is evaluating whether or not to allow future courtroom camera coverage in the state, is (Miami **Herald**, 6-30-78) without substantial empirical data on the influence of court cameras on juries. One study was conducted by three Florida professors on the views of court personnel, jurors and judges, but the judges were split, according to initial findings. About 76.6 percent of 130 circuit judges responding to the survey said that television cameras caused no "serious distraction" in court, and about 68.1 percent of the judges said television cameras had no "adverse influence" on witnesses. More than half of the jurors questioned said television cameras were not distracting, but 35 percent said television cameras were distracting.

During the year-long experiment, there were (Miami **Herald**, 6-30-78) no major confrontations between the judiciary, the bar and media, but there were some problems:

> —During one bombing trial, a circuit judge prohibited the filming of testimony by federal informants who are living under new identities.
>
> —In Jacksonville, a judge barred, then admitted, cameras into court for the murder trial of a local disc jockey. Another Jacksonville judge prohibited cameras from filming the guilty plea of a defendant known as the "Springfield rapist."
>
> —In Sarasota, a judge prohibited the television filming of the testimony of a 16-year-old rape victim, but allowed still photography. The Sarasota **Herald-Tribune** was widely criticized after it published the victim's photograph.

Florida's present debate is a microcosm of the national controversy over whether to allow news cameras to record criminal trials. The executive committee of the Florida Conference of Circuit Judges has voted (Miami **Herald**, 7-20-78) against returning television cameras to courtrooms in the state. The conference chairman has said that the brief segments presented to the public did not warrant the continuous tension and recurring delays and disruption. A report to the state's Supreme Court said that whatever benefit the public may have derived from a one-year experiment with television in the courtroom, it has not been worth the trouble. The public may disagree. When Herman's trial was broadcast opposite "Barnaby Jones" and "Quincy," it drew as large a share of the audience as either of the fictional whodunits.

. . . And Some Bad News for Cameras

Proponents of camera coverage have suffered setbacks in several states. The Illinois Supreme Court last May rejected (St. Louis **Globe-Democrat**, 5-30-78) an effort to open courtrooms to radio and television coverage. The court, which has jurisdiction over all levels of state courts, issued its ruling without explanation, though some broadcasters felt that suspension of the experimental program in Florida was a major factor in the decision.

Last April, an Indianapolis trial judge stopped the televising of a murder trial in progress, after receiving a letter from the chief justice of Indiana that threatened to bring him up on charges of violating the state Judicial Canons of Ethics.[10] The controversy arose when Judge John V. Wilson Jr. permitted film and audio tape recordings to be made during the trial of a man charged with murdering an heiress. After the news media were allowed to plug into a closed circuit television system already installed in the courtroom, the judge received a letter signed by Chief Justice Richard Givan that threatened disciplinary

proceedings. The letter went to every judge in the state. Givan was later quoted as saying that the letter was a form letter and its arrival at Judge Wilson's office was only coincidental with the televised trial in progress.

A Washington judge was not happy about the cameras in his courtroom.[11] He said participants in a trial that he allowed to be filmed and photographed were affected by the presence of the cameras. He personally "felt a continuous pressure from the newspaper reporters and TV cameras." He added that late in the day when all the cameras and reporters were gone "it seemed as if there was a general easing and relaxation of previous tensions, and a sigh of relief seemed to breathe through the crowded court." Also in that trial, which involved religious zealots who spanked a three-year-old boy until he died, several complaints were received: The bailiff was continually being asked by media representatives to work out seating and camera location problems, and the judge was drawn into some conflicts among members of the media who were competing for limited space within the courtroom.

Mechanical Problems and Solutions

Conflicts in the Washington judge's courtroom were caused by incompatible equipment, which prevented pooling from a single camera. Often, however, several television and radio stations can plug into one system, so that a single camera and recording device can provide a tape for any number of stations to use for broadcast. One of the major arguments in the past against cameras has been that they are distracting — to the judges, the attorneys, the defendants and the juries. Advances in technology have helped to all but eliminate that problem.

Last year, two West Virginia circuit court judges granted a demonstration of courtroom photography.[12] An officer in the state's News Photographers Association arranged the demonstration, in which he let the judges hear the noise levels of various cameras. Cameras today are quieter and smaller, and they hold rolls of film rather than the single sheets that had to be changed between each picture. Modern cameras also have telephoto lenses that allow photographers to remain a good distance from their subjects. The production manager from an educational television station showed the judges videotape equipment that is completely quiet, except when cassettes are changed, and that may be done outside the courtroom.

Many judges have found the pooling arrangement to be an effective way of reducing the number of media people who are present in the courtroom at any given moment. In Georgia, photographers must sign a form that stipulates restrictions on picture taking, plus an agreement that they will not remain more than 10 minutes inside the courtroom before returning to the waiting pool.[13] In some instances, photographers take their pictures from a television monitor that is located outside the courtroom.

Oklahoma was the setting for a unique solution to crowded courtroom conditions.[14] During the trial of a man accused of murdering three Girl Scouts, there were almost as many reporters as seats in the county courthouse, and a jammed courtroom caused disruptions. A television news director and a newspaper editor petitioned the state Supreme Court for permission to televise the proceedings. Subsequently, the court allowed one camera to be mounted at the rear of the courtroom. A cable was strung over rooftops to an auditorium designated "Courtroom B" and presided over by a bailiff. In this manner, television extended the courtroom by providing a closed circuit telecast to a 500-seat auditorium. The telecast was allowed for no other purpose than to enlarge the courtroom. The judge said he was satisfied that television cameras could help Oklahoma's courtrooms and that he would favor an expanded role for television, provided it did not become disruptive to the court.

Other problems have had simple solutions. In the Zamora trial, Judge Baker did not like all the extra lighting equipment brought in for the cameras, so it was removed. A dozen lightbulbs were placed (New York **Times**, 5-21-78) in regular ceiling sockets to illuminate the courtroom, and the judge said the lighting was neither distracting nor uncomfortable. Similarly, in a Las Vegas trial, the 100-watt bulbs in the courtroom were changed to 350-watt bulbs.[15] Courts no longer must resemble Hollywood movie sets in order for their proceedings to be filmed.

In a rather innovative move, Ohio Judge James Barbuto had his courtroom redesigned in a circular style in 1973.[16] It is without windows and has hidden ceiling lights. Three remote-control television cameras are discreetly located on the walls in the court, which was remodeled at a cost of $87,000. They swivel, turn and zoom to any part of the court and are controlled from a panel in a room outside the court. Barbuto feels his courtroom helps create a happy medium between the need for a fair trial and First Amendment rights. Television and radio reporters can cover a trial without ever having to go into the courtroom.

Some Cheer, Others Jeer

Just as there is disagreement within the states over the advisibility of allowing camera coverage of court proceedings, there is diversity of opinion on other levels as well. ABA President William B. Spann Jr. has called for the lifting of the ban on cameras at the appellate court level, but he feels the prohibition against coverage of trial court proceedings should remain until studies can be made on the effect of televised trials.[17]

According to a nationwide survey by the Washington **Post**, legal experts and the chief judges of the state supreme courts favor (Miami **Herald**, 7-20-78) opening trial and appeals courtrooms to television and radio coverage. They also favor opening up the now secret proceedings of the Judicial Conference of the United States and making the conference subject to the provisions of the Freedom of Information Act. Only one group surveyed came out against more open court procedures, and that consisted of members of the Judicial Conference itself. A number of those who favored having television and radio broadcast oral arguments in appeals courts and the Supreme Court expressed concern about the effect of cameras and microphones on trials, however.

The Conference of State Chief Justices at its annual meeting last summer recommended by a 49-to-1 vote that the nation's courtrooms, following guidelines from state supreme courts, allow coverage with cameras and microphones.[18] South Carolina's chief justice cast the only dissenting vote. The group, representing all 50 states, said the Code of Judicial Conduct should be amended to say that the supervisory court in each state may allow radio and television in its judicial proceedings.

Federal courts have not really dealt with the issue of cameras in courtrooms, but Chief Justice Warren E. Burger has let it be known that he emphatically opposes televising Supreme Court proceedings. He is reported (Los Angeles **Times**, 7-16-78) to have said last year, "I wouldn't sit on the bench if there were a television camera in the room," and

that the only business in the courtroom that cameras might record would be his funeral.

Attorney General Griffin B. Bell has made (Los Angeles **Times**, 7-16-78) some ambivalent remarks, saying cameras might make some lawyers "clean up their act" and make proceedings more efficient. But Bell also fears that witnesses might be inhibited by television. Bell's assistant, Deputy Attorney General Benjamin R. Civiletti, has said (Los Angeles **Times**, 7-16-78) he has "grave concerns" about the effect of television coverage on trials. Both, however, have endorsed electronic coverage in the federal appeals courts.

At its midwinter meeting, the ABA Committee on Fair Trial and Free Press proposed an end to the ban on broadcast coverage of criminal trials.[19] In a move that disappointed parties anxious for that group's decision, the ABA's House of Delegates failed to approve the suggested revision in August and decided instead to defer further action until its midyear meeting in February 1979. The disputed section reads:

> Television, radio, and photographic coverage of judicial proceedings is not per se inconsistent with the right to a fair trial. Subject to conditions and restrictions established by local rule or by agreement with representatives of the news media, such coverage should be permitted if the court in the exercise of sound discretion concludes that it can be conducted unobtrusively and without distracting the attention of trial participants.[20]

Some Wary Conclusions

Behold the visual society; its offspring pay nightly homage to Johnny Carson and glean their news from glowing tubes evidenced by an antenna-pierced skyline. Were cameras plague, the nation would be under quarantine and few families victimless.

Cameras are everywhere. Banks use them to identify robbers; churches use them to evangelize; grocery and department stores use them to discourage shoplifting; and schools use them for music and science lessons. The city fathers of one community plan to lower a $36,000 television camera into caverns below the town in order to update sewer maps. Perhaps it is true, as Dr. Frank Deaver has written, that society is coming to grips with the camera.[21] Deaver asserts that people have indeed adapted to advancements of communication technology and have grown more comfortable and less inhibited in the presence of accompanying paraphernalia.

Deaver wrote of electronic equipment in the courtroom:

> If it is true that the presence of a camera can make a witness or a defendant self-conscious, the same must certainly have been true when a court reporter sat with quill pen poised, ready to record the spoken word.
>
> When the stenotype introduced a mechanized but silent substitute for handwritten court records, it could have been argued that this technology somehow compromised the rights of the defendant or the validity of the testimony.
>
> When public address systems extended the audibility of voices from the witness stand, it might have been charged that the microphone was intimidating, or that it encouraged "grandstanding."
>
> When tape recorders were introduced to more accurately record the proceedings, someone might well have claimed this gadget compromised the defendant's right to a fair trial.[22]

Time and the courts themselves have accomplished nonviolently what an army of media representatives could never have wrought alone: Electronic coverage is a part of the judicial system, and attempting to remove it now would be a task tantamount to purging the letter "e" from the alphabet.

At least one media prophet foretold the awesome power of what was at the time a new medium:

> We shall stand or fall by television. Of that I am quite sure. . . . Television sounds may become more familiar to us than their originals. A door closing, heard over the air; a face contorted, seen in a panel of light — these will emerge as the real and the true; and when we bang the door of our own cell or look into another's face, the impression will be of mere artifice.

The words are E. B. White's, and he wrote them for **The New Yorker** in 1938.

FOOTNOTES

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3. Hoyt, p. 30.
4. Hoyt, p. 31.
5. "Dozen States Admit TV to Trials or Appeals," **The News Media & the Law**, April 1978, p. 23.
6. Ibid.
7. Hoyt, p. 31.
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14. "TV Gets Foot in Courtroom Door in Oklahoma," **Broadcasting**, July 31, 1978, pp. 43-44.
15. "Judge Endorses TV Presence at Murder Trial," **Broadcasting**, Dec. 20, 1976, p. 36.
16. "Special Design in Ohio Court for a 'Trial on TV,' " **Variety**, March 29, 1978, p. 46.
17. "ABA President Calls for Partial Lifting of Ban Against Cameras in the Courtroom," American Bar Association news release, April 13, 1978, p. 1.
18. "Advances Made in Access to Courtrooms," **Broadcasting**, Aug. 7, 1978, p. 29.
19. Hoyt, p. 34.
20. "Fair Trial and Free Press," **American Bar Association Standards Relating to the Administration of Criminal Justice**, Second Edition, Tentative Draft, Summer 1978, pp. 22-23.
21. "Cameras in the Courtroom: Are There Any Objections?" **Publishers' Auxiliary**, Nov. 10, 1976, p. 8.
22. Ibid.